Nisqually
Tribal Gaming Commission • 12819 Yelm Hwy SE • Olympia, WA 98513 • Phone: (360) 486-8500 • Fax: (360) 486-8512

November 14, 2006

Chairman Phil Hogan
National Indian Gaming Commission
1441 L Street, N.W.
Suite 9100
Washington, D.C. 20005

Re: Comments of the Nisqually Indian Tribe on proposed Class II regulations

Dear Chairman Hogan and Vice-Chairman Choney:

Thank you for the opportunity to comment on the National Indian Gaming Commission's proposal to (1) amend the definition of Electronic or Electromechanical Facsimile, and (2) publish "Classification Standards" for Class II games when played through an electronic medium. The Nisqually Indian Tribe hereby submits the following comments because the Tribe is deeply concerned that those proposed regulations would significantly restrict Class II gaming in a manner inconsistent with the intent of IGRA.

The Tribe is particularly concerned that if the proposed regulations are adopted, *virtually no electronic game* currently classified as Class II will remain as such. This unacceptable result would have devastating consequences for Nisqually and many other tribes that would lose years of considerable investment in the Class II industry. Because the Commission's proposal is not supported by the plain language of IGRA and the case law construing it, it should be withdrawn immediately.

We discuss the proposals in detail below.

1. Background.

As you are fully aware, Class II games may be authorized and regulated by a tribe (subject to NIGC oversight) without the need to negotiate a tribal-state compact, as long as the state allows such games for any purpose and the tribe adopts a gaming ordinance. Tribes may authorize Class III games only pursuant to a tribal-state gaming compact. As can be expected, because of the difficulties tribes face in some states in obtaining compacts from those states and, where they enter into compacts with states, in obtaining consent to the scope and quantity of games that they desire, tribes have sought to find and use Class II games that are marketable. For instance, while our Tribe's casino utilizes primarily class III games, we also operate a number of class II games in an effort to add diversity to our gaming floor. In addition to the value of class

II gaming as a means of satisfying customer requests for variety, in Washington it is an alternative to the demands of the compacting process. If finalized, however, this rulemaking will not only harm the viability of class II gaming, but will also substantially weaken the bargaining power of tribes as compacts expire and require renegotiation.

2. New Definition.

Under IGRA, Class II games are defined to include bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith), and (if played at the same location as bingo) pull-tabs, lotto, punch boards, tip jars, instant bingo and other bingo-like games. 25 U.S.C. § 2703(7)(A)(I). However, "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind" are expressly excluded from the definition of Class II games. 25 U.S.C. § 2703(7)(B)(ii).[1] Instead, such games are defined as Class III games. *Id.* § 2703(8).

The NIGC now proposes to modify Section 502.8 of the regulations defining "Electronic or electromechanical facsimile" as follows:

> (a) *Electronic or electromechanical facsimile* means a game played in an electronic or electromechanical format that replicates a game of chance by incorporating the fundamental characteristics of the game.
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> (b) Bingo, lotto, and other games similar to bingo are facsimiles when:
> (1) The electronic or electromechanical format replicates a game of chance by incorporating all of the fundamental characteristics of the game, or
> (2) An element of the game's format allows players to play with or against a machine rather than broadening participation among competing players.
>
> (c) Bingo, lotto, other games similar to bingo, pull tabs, and instant bingo games that comply with Part 546 of this chapter are not electronic or electromechanical facsimiles of any game of chance.

The NIGC states that the amended definition is intended to address a misconception by some that bingo facsimiles are permissible Class II games. According to the Commission, this definition will make clear that all games including bingo, lotto and "other games similar to

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[1] "[A]ny banking card games, including baccarat, chemin de fer or blackjack (21)" are also expressly excluded from the definition of Class II games. 25 U.S.C. § 2703(7)(B)(I).

Under the current regulation, electronic or electromechanical facsimile is defined as:

> *Electronic or electromechanical facsimile* means a game played in an electronic or electromechanical format that replicates a game of chance by incorporating all of the characteristics of the game, except when, for bingo, lotto, and other games similar to bingo, the electronic or electromechanical format broadens participation by allowing multiple players to play with or against each other rather than with or against a machine.

bingo," when played in an electronic medium, are "facsimiles" when they incorporate all of the fundamental characteristics of the game.

However, this purported justification for these regulations is based on a critical misconception of what IGRA intended. While IGRA did not define the term "facsimile," the plain language of the statute legislative history strongly suggest that Congress did not intend the facsimile prohibition to restrict the use of electronics to play bingo games. Instead, the term facsimile was used as shorthand for games where, unlike true bingo games, the player plays only with or against the machine and not with or against other players. As explained in the Senate Report:

> The Committee specifically rejects any inference that tribes should restrict class II games to existing games [sic] sizes, levels of participation, or *current technology*. The Committee intends that tribes be given the opportunity to take advantage of modern methods of conducting class II games and the language regarding technology is designed to provide *maximum flexibility*. . . . Simultaneous games participation between and among reservations can be made practical by use of *computers and telecommunications technology* as long as the use of such technology does not change the *fundamental characteristics of the bingo or lotto games* and as long as such games are otherwise operated in accordance with applicable Federal communications law. In other words, *such technology would merely broaden the potential participation levels and is readily distinguishable from the use of electronic facsimiles in which a single participant plays a game with or against a machine rather than with or against other players.*

S. Rep. No. 100-446 at 9 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3079 (emphasis added).

This Report makes clear that the use of technology, even if it allows fundamental characteristics of bingo to be played in an electronic format, does not necessarily make a bingo game a "facsimile." Rather, a bingo game played using technologic aids (which are expressly permitted by 25 U.S.C. 2703(7)(A)(I)), only becomes a facsimile if the technology permits the player to play "with or against a machine rather than with or against other players."

The courts have uniformly agreed with this interpretation. In the MegaMania cases, the courts ruled that MegaMania is not an exact copy or duplicate of bingo and thus not a facsimile because the game of bingo is not wholly incorporated into the player station; rather, the game of bingo is independent from the player station, so that the players are competing against other players in the same bingo game and are not simply playing against the machine. *See United States v. 103 Electronic Gambling Devices*, 223 F.3d 1091, 1100 (9th Cir. 2000); *United States v. 162 MegaMania Gambling Devices*, 231 F.3d 713, 724 (10th Cir. 2000).

The NIGC's proposed change to the definition of "facsimile" ignores this critical distinction and would unlawfully restrict the range of technologic aids available to tribes. There is no reason for the NIGC to alter the current definition, which was adopted in 2002 for the

express purpose of bringing the NIGC's previous definition of "facsimile" into compliance with case law.

3. Classification Standards.

The Commission proposes to add a new set of regulations, 25 C.F.R. Part 546, to determine whether a game of bingo or lotto, "other game similar to bingo," or a game of pull-tabs or "instant bingo," meets the IGRA statutory requirements for Class II gaming, when such games are played electronically, primarily through an "electronic, computer or other technologic aid," while distinguishing them from Class III "electronic or electromechanical facsimiles."

The proposed regulation would also impose an onerous certification procedure in which an Indian tribe proposing to add a new Class II game would have to submit the game to a laboratory testing by a facility "recognized by the Commission." Tribal gaming commissions are permitted to impose additional requirements, but otherwise have no meaningful role in the framework proposed by the NIGC. This is contrary to the IGRA, which specifies that tribes have the primary responsibility to "license and regulate . . . class II gaming on Indian lands within such tribe's jurisdiction." 25 U.S.C. 2710(b)(1).

As with the new definition of *electronic or electromechanical facsimile*, the Commission appears to be moving toward a very restrictive view of what types of games, when played in an electronic form, constitute bingo, games similar to bingo, and pull-tabs. For instance, the proposed regulations would limit the use of the autodaub feature, the types and sizes of prizes offered, speed of play, the size and format of electronic bingo cards, and the initiation of play on Class II technologic aids.

Tribes and tribal advocates have made clear to the Commission throughout the history of IGRA that Congress never meant to limit Indian tribes to the most simplistic and rudimentary forms of bingo and similar games or prevent Indian tribes from making the most of current technology. By broadly defining bingo to mean any game that meets three basic requirements set out in the IGRA, Congress intended to allow tribes to offer an expansive range of game variations under the broad category of bingo. 25 U.S.C. 2703(7)(A)(i). In fact, Congress made clear that tribes could offer not just "bingo," but numerous related games – "pull-tabs, lotto, punch boards, tip jars, instant bingo, ..." *Id.* Indeed, Congress declared that tribes also could offer any "other games similar to bingo." Finally, Congress emphasized the broad scope of Class II by explicitly stating that tribes could offer such games with "electronic, computer, or other technologic aids," 25 U.S.C. 2703(7)(A)(i).

As a result, IGRA already draws the bright line between Class II and Class III gaming that Commission thinks is being created by these proposed regulations. In other words, Congress specifically intended to allow tribes to play as Class II games a wide range of bingo and specified bingo-like games in an electronic format as long as the electronics do not allow a player to play alone with or against the device. In short, there is no basis for the NIGC to impose additional classification requirements to go beyond those set forth by Congress.

As explained by one Court of Appeals:

> Whatever a nostalgic inquiry into the vital characteristics of the game as it was played in our childhoods or home towns might discover, IGRA's three explicit criteria, we hold, constitute the sole *legal* requirements for a game to count as class II bingo.
>
> There would have been no point to Congress's putting the three very specific factors in the statute if there were also other, implicit criteria. The three included in the statute are in no way arcane if one knows anything about bingo, so why would Congress have included them if they were not meant to be exclusive?

103 Electronic Gambling Devices, 223F.3d at 1096 ("Moreover, § 2703(7)(A)(i)'s definition of class II bingo includes other games similar to bingo, 25 U.S.C. § 2703(7)(A)(i), explicitly excluding any reliance on the exact attributes of the children's pastime."). *See also 162 MegaMania Gambling Devices*, 231 F.3d at 723 ("While the speed, appearance and stakes associated with MegaMania are different from traditional, manual bingo, MegaMania meets all of the statutory criteria of a Class II game, as previously discussed.").

4. Conclusion.

During the consultation between Chairman Hogan and other NIGC officials in Tacoma, the Commission repeatedly sought to justify these proposed regulations by referencing the fear that Indian gaming is at risk because some tribes may be offering Class III machines as Class II games. While we appreciate the Commission's concern for tribal gaming in general, quite simply, these regulations go well-beyond what may be necessary to ensure the integrity of Indian gaming. Indeed, these regulations would obliterate the state of technologically aided Class II gaming as we know it. And it would do so by effectively outlawing machines that are unequivocally lawful under IGRA and the cases construing it. For these reasons, the Commission should withdraw these regulations immediately.

Sincerely,

Mark Butterfield, Executive Director
For Lorna Kalama, Chairwoman
Nisqually Tribal Gaming Commission